# In the Supreme Court of the United States

OCTOBER TERM, 1973

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No. 72-1639

BRAD SIMON BABICH AND JAMES M. JOHNSON, PETITIONERS

*v.*

UNITED STATES OF AMERICA

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No. 72-1654

JOHN T. SPANN, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

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**MEMORANDUM FOR THE UNITED STATES IN OPPOSITION**

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Petitioners argue that a search warrant, pursuant to which 664 pounds of marijuana were found and admitted into evidence, was invalid because the underlying affidavit executed by a law enforcement officer was insufficient.

A three count indictment returned in the United States District Court for the District of Nevada, charged petitioners with having conspired to import marijuana into the United States, with having imported marijuana

into the United States from Mexico, and with having possessed marijuana with intent to distribute, in violation of 21 U.S.C. 952(a), 960(a)(1), 841 and 18 U.S.C. 2. Following a jury trial, petitioners Babich and Johnson, petitioners in No. 72-1639, were convicted on all three counts. The possession count (Count 3) was dismissed as to Spann, petitioner in No. 72-1654, and he was convicted under the remaining counts. Babich was sentenced to five years' imprisonment followed by a five year parole term; Johnson to three years' imprisonment and three years' parole; and Spann to six months' imprisonment followed by four and one-half years' probation. The court of appeals affirmed on April 5, 1973 (Pets. Apps. A) and denied a petition for rehearing with a suggestion for rehearing *en banc* on May 8, 1973.[1]

Regarding the search and seizure, the evidence at trial and at the hearing on the motion to suppress showed the following.

On August 4, 1971, an agent of the Nevada Department of Fish and Game observed an airplane burning in a dry lake bed in Lander County, Nevada (Tr. I, 109).[2] He radioed his warden, who notified the sheriff of Lander County in Battle Mountain, who, in turn, called his deputy in Austin. The deputy and the warden then joined the Fish and Game agent at the scene and investigated the aircraft (Tr. IV, 824-829). In one of

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[1] The joint petition for certiorari of petitioners Babich and Johnson was timely filed. The separate petition for certiorari of petitioner Spann was not filed until June 9, 1973; it is therefore out of time under Rule 22(2) of the Rules of this Court.

[2] The transcript is in seven columes, a copy of which is lodged herewith. It is hereinafter referred to by the notations Tr. I through VII.

the plane's empty baggage compartments they found remnants of marijuana seeds and stems (Tr. IV, 831-833). The officers also observed that the identification numbers of the plane had been altered by tape and saw vehicle tracks leading northerly and southerly from the crash site (Tr. IV, 843-849).

Later that day an F.B.I. agent and an agent of the Federal Aviation Administration (FAA), accompanied by two deputy Sheriffs, visited the scene of the crash. After having thoroughly investigated the aircraft, they followed the tire tracks leading north from the scene and, about two-and-one-half miles away found a deserted camper truck mired in mud. The back door had been broken open and they could see a number of white sacks with Spanish words printed on them. From the interior came a strong smell of marijuana (Tr. IV, 858-862). The officers did not immediately search the truck. They decided instead to first secure a search warrant (Tr. IV, 863). One deputy Sheriff stayed with the truck while the other returned to Austin and telephoned the results of the investigations of the aircraft and truck to Sheriff Schwin (who had been previously advised of the ongoing investigation), and the district attorney at Battle Mountain. An affidavit was then prepared by the district attorney and signed by the Sheriff. It read as follows:

> "GEORGE E. SCHWIN, being first duly sworn, deposes and says on information and belief:
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> 1. Affiant has received reports of large-scale narcotics drops being made in southern Lander County.
>
> 2. That on or about August 4, 1971, an aircraft was observed burning in a Dry Lake near Grass

Valley in Lander County and investigation showed the fire to be of incendiary origin. Investigation also showed a portion of the unburned part of the aircraft cabin to contain small quantities of what appeared to be a dangerous drug, to-wit marijuana.

3. That the type of aircraft involved had sufficient fuel capacity and carrying capacity to be used for large-scale transportation or importation of marijuana or other illicit drugs, and the quantity of gas in the aircraft fuel tanks indicated that a flight had been made of approximately 1000 miles, which distance is sufficient to represent a flight from Mexico. That the aircraft had been stripped of cargo and tire tracks led from the location on the dry lake where the aircraft had disabled its landing gear.

4. That investigation further showed that the disablement of said aircraft occurred on landing and the tire tracks aforesaid led to a 1960 White International Pickup. Lic. No. WA 0882, 1971 License sticker No. 927641.

5. That earlier reports of a vehicle or vehicles traveling in the area around the time the aircraft was discovered indicated a Washoe County tag.

6. That there is in said vehicle, and apparent from external inspection several bags, plastic, of the sort used to transport marijuana and said bags contain what appears to be Mexican writing thereon.

7. That said bags, if marijuana, would contain approximately 200 pounds of said drug and said drug in that condition emits a characteristic sweet smell such as the odor coming from said pickup.

8. Said pickup and the contents thereof therefore constitute evidence that shows or tends to show that a public offense has been committed or that the above named defendants or others committed a public offense.

WHEREFORE, affiant asks that a search warrant be issued for the above name 1960 White International Pickup and its camper and the environs of the downed aircraft and camper for marijuana or other dangerous drugs, any paraphernalia used in connection therewith and for any firearms or other equipment used or useful in the distribution and dissemination of dangerous drugs.

Based upon this affidavit, a search warrant was issued by the justice of the peace at Battle Mountain. The Sheriff returned to the mired truck at about midnight, August 5, and the following day the truck was searched and the 664 pounds of marijuana was seized (Tr. IV, 867-868).

Petitioners' challenge to the validity of the affidavit is without merit. They do not dispute that the information, if believed, establishes probable cause; rather, they attack its reliability, claiming that the affidavit, given upon "information and belief," is fatally defective because it does not specifically describe the persons from whom, or the circumstances under which the information was derived.

As the court below pointed out, information from fellow officers engaged in a common investigation is plainly a reliable basis to support a warrant, *United States* v. *Ventresca*, 380 U.S. 102, 111. Here, the affidavit refers to reports, to investigation and to inspection, and explicitly says the "investigation showed" and that reports were received by affiant, a law enforce-

ment officer. It is also implicit from the nature of the disclosures (*i.e.*, the incendiary origin of the fire, the carrying capacity of the aircraft, the quantity of gas in the tanks, etc.), that such observations could only have been made by official investigators. Moreover, the detailed nature of this information is itself an indication of its reliability. Cf. *Draper* v. *United States,* 358 U.S. 307.

Additionally, we note that the investigating officers lawfully could have searched the truck when they found it. See, *e.g., Chambers* v. *Maroney,* 399 U.S. 42; *Carroll* v. *United States,* 267 U.S. 132.[3] They chose instead—despite considerable inconvenience and about ten hours delay—to obtain a search warrant. To encourage precisely such action on the part of law enforcement officers, this Court has consistently expressed its preference for searches with warrants, as opposed to those without. See, *United States* v. *Ventresca,* 380 U.S. 102, 106; *Jones* v. *United States,* 362 U.S. 257, 270. Given the inherent reliability of the disclosures in the instant affidavit, coupled with the overriding policy in favor of obtaining search warrants in circumstances such as are present here, we submit that the courts below properly upheld the validity of the warrant.

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[3] Indeed, the circumstances would have justified such an on-the-spot search. The marijuana stems and seeds found in the plane; the tire tracks leading from the plane to the truck; the bags with Spanish writing on them seen in the truck; and the strong smell of marijuana emanating therefrom, amounted to more than probable cause to believe that the truck contained marijuana. Exigent circumstances existed as well. As the district court found (at page 6-7 of its order denying the motion to suppress) "While the truck was mired in the mud, it could be dug and towed out without too much difficulty. It would have been the height of carelessness and inefficiency to have abandoned the truck in the remote Nevada desert until a search warrant could be obtained. Seizures of vehicles under like circumstances have been uniformly sustained [citations omitted]."

It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

ROBERT H. BORK,
*Solicitor General.*

AUGUST 1973.